was only one and not two pieces of land, must be viewed. Thus it was said by the defendant that the plaintiff had told the Penggawa in a settlement bid that she wanted to exchange her own rubber land with the one for the disputed Lot 1483 *and that she had not mentioned about Lot 1318.* But in the face of the defendant's own evidence at the enquiry that he had bought these lands and this took place, from the plaintiff's evidence and the surrounding circumstances, after their marriage, how could it ever be true that the defendant had never discussed with the Penggawa the fate of Lot 1318. I would venture to say that the Penggawa had said only half the truth because he said: "There was a discussion regarding the land belonging to the plaintiff". But in the absence of evidence as to who prompted it, how did the rubber land come into the picture? If it had been raised by the defendant it was most unlikely that she would not have mentioned Lot 1318, having also bought it during the marriage. If she had not mentioned it then it would not be unreasonable to expect and to assume that the Penggawa being anxious to settle the dispute between the parties would have done so, because how conceivably would he otherwise have come to the conclusion that the plaintiff's rubber land was suitable for the purpose of the exchange with Lot 1483. Any reasonable person in the circumstances of the Penggawa would have asked the plaintiff, knowing that the point of dispute centred principally on the house supposedly owned by both but on the land registered in the defendant's name, and the plaintiff insisted on having the house and the Penggawa himself had advised that the house should not be uprooted from the land, whether the defendant would agree to exchange with another land of the plaintiff and therefore the natural and obvious thing for the Penggawa to do then was to find out whether the plaintiff had lands at all and if so what type and where they or it was situated. And naturally the existence of Lot 1318 would, quite unavoidably and inevitably, have been raised by either the plaintiff or the defendant or even the Penggawa himself who would normally know the lands in his own area. I believe that the Penggawa tried his best to show that he was impartial when in fact and in truth he was not, but that was not unexpected, if only it is remembered that the initiative to have the matter settled with the Penggawa was taken not by the plaintiff but by the defendant himself.

I do not think I need elaborate further on the evidence, especially on the credibility of witnesses except to say that as far the Penghulu, D.W.(3), was concerned he was frank enough to admit after very thorough and lengthy cross-examination that he did not know anything about these lands except what the defendant told him.

In my view the defendant had not rebutted the plaintiff's claim of *Harta Sepencarian* and I would therefore enter judgment for the plaintiff with costs and make the order in terms of the prayer.

Judgment for the plaintiff.

Solicitors: *Dzaiddin & Co.; Mohamed Yaacob & Gomez.*

PUBLIC PROSECUTOR v. PUA KIA SING & ANOR.

[A.Cr.J. (Ong Hock Sim F.J.) January 17, 1977]
[Kuala Lumpur — Selangor Criminal Appeal No. 119 of 1975]

Criminal Law and Procedure — Robbery with deadly weapon — Whether s. 397 Penal Code, creates offence — Whether s. 34 Penal Code applies in construing s. 397 — Sentence — Penal Code, ss. 34, 392 and 397.

In this case the respondents had been charged under sections 392 and 397 of the Penal Code and acquitted. The Public Prosecutor appealed.

Held: (1) the learned President of the Sessions Court had most carefully dealt with the case and come to a proper conclusion upon the evidence;

(2) section 397 of the Penal Code does not create any offence and section 34 of the Code cannot therefore be invoked for the sole purpose of administering the additional penalty of whipping upon persons involved in the offence charged but not armed with any deadly weapon. Section 34 has no application in the construction of section 397.

Cases referred to:-

(1) *Subramaniam & Anor* v. *Public Prosecutor* [1976] 1 M.L.J. 76.

(2) *Rex v. Yeo Kim Watt* [1946] M.L.J. 155.

(3) *Lee Wai Kam* v. *Public Prosecutor* [1976] 2 M.L.J. 19.

CRIMINAL APPEAL.

Abdul Razak bin Ibrahim (Deputy Public Prosecutor) for the appellant.

Respondents absent.

Ong Hock Sim F.J.: This is an appeal by the Pendakwa Raya from the decision of the learned President, Sessions Court, Kelang acquitting and discharging the respondents of a charge under sections 392 and 397 of the Penal Code. The charge reads: —

"That you on December 10, 1974 at about 4.45 p.m., at Batu 1½ Jalan Kapor, in the District of Kelang, in the State of Selangor, in furtherance of common intention under section 34 of the Penal Code, committed the theft of one Seiko wrist watch valued at $100 and cash $130 belonging to one Loh Kian Kiong (m), and in committing the theft, you voluntarily caused wrongful restraint to the said Loh Kian Kiong and thereby committed the offence of robbery and at that time you were armed with a deadly weapon, to wit, a bearing scraper, and you have thereby committed an offence punishable under sections 392 and 397 of the Penal Code."

The respondents were absent and apparently they had not been served with the Notice of Appeal. The learned Deputy Public Prosecutor asked me to treat the appeal as an application for extension of time to file an appeal. I see no point in doing so, as I am satisfied from the record that the learned President had most carefully dealt with the case and come to a proper conclusion upon the evidence.

In my view section 397 of the Penal Code does not create any offence and section 34 cannot therefore be invoked for the sole purpose of administering the additional penalty of whipping upon others involved in the offence charged. Section 397 reads: —

"If at the time of committing or attempting to commit robbery, *the offender is armed* with or uses any deadly weapon, or causes grevious hurt to any person, or attempts to cause death or grevious hurt to any person, *such offender shall be liable* to be whipped, *in addition to any other punishment* to which he may be liable under any other section of this Code."

I do not think that mental ingenuity is required for a comprehension of the language of section 397. It does not create an offence but empowers the court to impose a punishment *in addition to* any other sentence provided by law for his offence.

I may add that I am in agreement with Ajaib Singh J. in *Subramaniam & Anor.* v. *Public Prosecutor*[1] that section 34 cannot be invoked for the purpose of punishing other than the offender armed. I am aware that Abdoolcader J. followed *Rex* v. *Yeo Kim Watt*[2] (a Singapore case) in holding in *Lee Wai Kam* v. *Public Prosecutor*[3] that "there was no reason why section 34 of the Penal Code should not apply to section 392 read together with section 397 of the Penal Code *as it applies to other offences*" (emphasis is mine). With respect those judgments erred in accepting section 397 as creating an offence which, I repeat, is not supported by the language of the section. The Penal Code of Singapore had the same sections 397 and 398 as the Indian Penal Code prior to the 1938 amendment. The new section 397 did no more than remove the mandatory minimum imprisonment that was provided under the old sections 397 and 398 but enacted that whipping may be inflicted, as an *additional penalty* to that prescribed for the offence charged in regard to the offender who was armed at the time of the offence. There is no reason to differ from the Indian Courts that section 34 has no application in the construction of section 397.

Order accordingly.